Concise Explanatory Statement
Second Engrossed Senate Bill (2ESB) 6097

Concise Explanatory Statement for 2ESB 6097
The following concise explanatory statement for 2ESB 6097 is arranged according to the section number identified in the bill.

Section 1. RCW 50.01.010, Preamble

Comment: The deletion of "liberally construed" from the preamble requires the Department to strictly construe the Act.

Reasons Not Incorporated in Final Rules: The preamble is not substantive law. The general rule of statutory construction for remedial legislation assumes liberal construction unless there is a specific legislative mandate for strict construction. No such mandate was incorporated into this legislation.

In addition, the state is required to administer the unemployment insurance program in a manner that does not conflict with federal law. In doing so, the department relies heavily on guidelines issued by the U.S. Department of Labor. Unemployment Insurance Program Letter 30-96 contains the following statement:

> The Department [of Labor] has long taken the position that, because FUTA is a remedial statute aimed at overcoming the evils of unemployment, **it is to be liberally construed to effectuate its purposes** and exemptions to its requirements are to be narrowly construed. This interpretation avoids "difficulties for which the remedy was devised and adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." (emphasis added)

This position is based on U.S. Supreme Court rulings in the cases of United States v. Silk, 331 U.S. 704, 712 (1947) and Farming, Inc. v. Manning, 219 F.2d 779, 782 (3d Cir., 1955).

The Department will continue to weigh all the facts equally and make decisions based on the weight of evidence.

Section 3. RCW 50.20.010(1)(c)(ii), Benefit Eligibility Conditions

Comments:
- The new language in this section applies to collectively bargained labor-management agreements.
- It is critical for the Department to maintain the full-referral union program.

Incorporated In Final Rule: Under WAC 192-180-010, the provisions requiring compliance with dispatch or referral requirements will apply to claimants who are members of full-referral unions. The referral union program will be maintained by the department.

Section 4. RCW 50.20.050(2)(b)(i) through (x), Disqualification for leaving work voluntarily without good cause

Comment:
The ten reasons identified in statute for voluntary quits should not be considered as all-inclusive. Nothing in the language of the statute supports such an interpretation and is inconsistent with the long-standing interpretations by the agency and courts developed through case law. The proposed regulations should therefore not contain any language that would suggest the listing is exclusive.

Reasons Not Incorporated in Final Rule: "Good cause" is limited to the ten reasons identified in statute. The statute says that an individual is not disqualified for leaving work voluntarily "when" and then lists 10 reasons. In comparison, the new misconduct statute, RCW 50.04.294 provides that acts of misconduct include but "are not limited to" a list of examples. The voluntary quit statute does not contain this parallel language.

In addition, the final House Bill Report on passage of 2ESB 6097 states: "*The reasons specified in the Act as good cause for leaving work voluntarily are limited. . . . The Commissioner's discretion to determine that other work-related factors are good cause for leaving work is eliminated."*

Comment: WAC 192-100-010. The proposed definition of a "reasonably prudent person" will hold all claimants to a standard of being literate, educated and savvy. Many claimants have either mental or physical disabilities that would never allow them to measure up to the reasonably prudent person standard. The Department should modify the definition to include a reference that would allow consideration of "a claimant's particular circumstances."

Reasons Not Incorporated in Final Rule: The "reasonably prudent person" standard has been developed over many years through policy and case law. Each claimant's situation is addressed on an individual basis. The term "similar situation" permits the department to consider the individual's physical or mental disabilities when determining whether his or her actions were reasonable.

Comment: The second sentence of WAC 192-100-010 should read: "The actions of a person exercising common sense in a similar situation are the guide in determining whether an individual's actions ***in the claimant's circumstances*** were reasonable."

Reasons Not Incorporated in Final Rule: Does not add clarity to the definition.

Comments:
- Each of the proposed rules for voluntary quits Section 4(2)(b)(v) through (x) requires employer action. The legislation does not establish that employer action must have caused the reduction in compensation or hours, or the change in worksite. The language used in the proposed rules should state that the change could not be initiated or caused by the claimant.

The change must be the result of an action taken by the employer or "otherwise be due to factors beyond the claimant's control."

- Nothing in the legislation provides that the (voluntary quit) factors as issued must be caused by the employer, rather than by factors outside either the employer's or employee's control. The requirement that the changes must be employer initiated is inconsistent with statute. At most, a rule should provide that the change must be due to factors beyond the claimant's control.

Reasons Not Incorporated in Final Rule: Although included in earlier drafts of the rule, the language permitting good cause for changes resulting from "other factors beyond the claimant's control" has been eliminated from the final rule. Under RCW 50.29.021, if a claimant quits work because of a change in conditions listed in subsections (v) through (x), the employer from whom the separation occurred will be charged 100 percent of the benefits paid on that claim. Since the legislature imposed this penalty on employers, it follows that the legislature intended that good cause be found when the employer has taken the action that adversely affected the claimant.

Section 4. RCW 50.20.050(2)(b)(i) Quit to accept a bona fide offer of work

Comment: WAC 192-150-050. The proposed new subsection (6), "The wages, hours and other working conditions would be considered suitable employment under RCW 50.20.100 and RCW 50.20.110," has no basis in law and should be deleted. The law only requires that the new work be in employment covered under Title 50 RCW. Claimants often accept stop-gap employment or a promise of a different job with training and these jobs fall through. Under the proposed rule, benefits could be denied because these new types of work might not be considered suitable.

Incorporated in Final Rule: Although originally proposed as a result of stakeholder input, this subsection was eliminated from the final rule.

Comment: WAC 192-150-050. The proposed new subsection (7), "Your (the claimant's) statements are convincing that the work was accepted with no intention to avoid a potential disqualification," has no basis in law and should be deleted. It invites speculation as to whether a claimant's statements are convincing.

Incorporated in Final Rule: Although originally proposed as a result of stakeholder input, this subsection was eliminated from the final rule.

Section 4. RCW 50.20.050(2)(b)(ii) Quit due to illness or disability

Comment: WAC 192-150-055. The definition of "immediate family" is too expansive and should not include "other relatives who temporarily or permanently reside in your (the claimant's) household."

Reasons Not Incorporated in Final Rule: The definition of "immediate family" is unchanged. Amendment is not required by 2ESB 6097 and is outside the scope of this rule-making action.

Comment: WAC 192-150-055. The definition of "immediate family" should remain as written. An immediate family member could be a brother, sister, or aunt whom the claimant has to care for regardless of whether the living arrangements may be temporary or permanent.

Incorporated in Final Rule: The definition of "immediate family" is outside the scope of this rule-making action and remains unchanged.

Comment: WAC 192-150-055 and WAC 192-150-060. Claimants should not be allowed to receive unemployment compensation and also have Family Medical Leave Act (FMLA) protection. The intent of the legislation was to make it clear that an individual had recourse under one law or the other law, but not both. In addition, an employer should not be required to hold a job open for a claimant at the same time this individual has been granted unemployment compensation benefits.

Incorporated in Final Rule: The legislation requires that individuals who voluntarily leave work because of illness or disability must terminate their employment to be eligible for unemployment benefits. Claimants will no longer be eligible for benefits while on a voluntary medical leave of absence from employment.

Comment: WAC 192-150-060(3). Claimants should make every reasonable effort to preserve the employer/employee relationship by informing the employer of what they can or cannot do and asking for other work that the employer might have within their limitations. The subsection should read: "You are required to request alternative work from your employer to be found available for work unless the request for alternative work would be a futile act."

Reasons Not Incorporated in Final Rule: The department signed a settlement agreement with the Unemployment Law Project in 1995 in which the department agreed that "A claimant will not be found unavailable for work for failing to request alternative work with the employer if s/he told the employer of the disabling condition and the employer did not offer alternative work." This provision is consistent with the Washington State Supreme Court's ruling in *Dean v. Metro* that the burden of offering alternative work is on the employer once the employer is advised of the individual's disability and resulting limitations.

Comment: WAC 192-150-060. Federal conformity is at issue with respect to the treatment of persons who are pregnant. Courts have previously ruled that the state of Washington does not conform to federal law by imposing more stringent requirements on pregnant claimants than on other groups. This section of law creates a conformity issue and should not be implemented.

Reasons Not Incorporated in Final Rule: The U.S. Department of Labor has reviewed this section and advised the department that it does not present a conformity issue with federal law.

Comment: Revise WAC 192-150-060 subsection (5) by changing the word "will" to "may."

Reasons Not Incorporated in Final Rule: When the department is aware that a claimant has refused an offer of work, we must determine whether the work was suitable and the claimant is disqualified from benefits under RCW 50.20.080.

Section 4. RCW 50.20.050(2)(b)(iii) Quit to relocate with spouse transferred by the military

Comments: This subsection of the law constitutes an equal protection violation because it discriminates against people based on where they move by virtue of their spouse's employment. This is a statutory problem as opposed to a rule-making problem.

Reasons Not Incorporated in Final Rule: The U.S. Department of Labor has not identified a conformity issue with this subsection. The department presumes the statute is constitutional unless a court of competent jurisdiction rules otherwise.

Comment: WAC 192-150-110. The Department should maintain a list of those states that allow good cause for a quit to follow spouse due to a mandatory military transfer.

Incorporated in Final Rule: The department will maintain a list of those states that allow good cause under these circumstances, and update it annually.

Comment: WAC 192-150-110. For reasons beyond his or her control, an individual may not be able to accompany a military spouse who has been called up to active duty. Instead, the non-military spouse returns to the home of record. To support the policy underpinnings of maintaining the family unit when a forced job transfer occurs, benefits should be allowed to the non-military spouse who returns to the home of record.

Reasons Not Incorporated in Final Rule: As amended, the principle of maintaining family unity is no longer an emphasis in the statute. Language which permitted a lesser disqualification to persons who left work because of marital or domestic responsibilities has been eliminated. The language regarding "quit to follow spouse" was amended in 2000 to apply only to individuals whose spouse had been mandatorily transferred by the employer. Current law limits its application to individuals whose spouse has relocated to another labor market area because of a mandatory military transfer. A common sense reading of the statute indicates that it was intended to apply to individuals who accompanied their military spouse to the new labor market area. If the individual was unable to relocate to the spouse's active duty site, they could have continued to work for their current employer. The choice to return to the home of record is personal, not work-connected.

Comment: WAC 192-150-110. Benefits should be allowed to an individual who quits work to accompany a spouse who is discharged from military service and returns to the home of record.

Reasons Not Incorporated in Final Rule: The statute clearly limits this section to individuals who accompany a spouse who is relocating because of a "mandatory military transfer." There is

no provision in the law for allowing benefits to spouses of discharged service members who elect to return to their home of record following completion of service.

Comment: WAC 192-150-110. In order to be eligible for benefits under this section, the non-military spouse should be required to reside with their military spouse at the new duty station following a mandatory military transfer.

Reasons Not Incorporated in Final Rule: This is not strictly required by the statute. In determining eligibility under this section, the department will determine whether the claimant quit work to accompany a spouse to a new labor market area. In most cases joint residency would be assumed. However, there may be instances where the military may not permit a spouse to reside at the service member's duty station, and the non-military spouse resides near the duty station.

Comment: WAC 192-150-110(2). In this section, use of the word "good" cause should be changed to "justifiable" cause to quit work.

Reasons Not Incorporated in Final Rule: The statute uses the term "good cause" for voluntarily leaving work.

Comment: In WAC 192-150-110(2)(a) strike the phrase "that allows benefits to individuals who quit work to accompany their military spouse."

Reasons Not Incorporated in Final Rule: The statute requires that the military spouse be transferred to a state "that, pursuant to statute, does not consider such an individual to have left work voluntarily without good cause." In other words, the state to which the military service member was transferred must also allow benefits to spouses who quit a job to accompany a military spouse to a new labor market area. Eliminating this phrase would change the application of the statute.

Section 4. RCW 50.20.050(2)(b)(v) Quit due to 25% or greater reduction in compensation.

Comment: WAC 192-150-115. The Department should use the current definition of remuneration contained in RCW 50.04.320. However, bonuses and overtime could be discretionary and a promise of a salary increase sometime in the future should not be considered usual compensation.

Incorporated in Final Rule: The department will use the definition of remuneration contained in RCW 50.04.320 to determine whether an individual's compensation has been reduced by 25% or more. Temporary overtime will not be included in the calculation. Bonuses may be included depending on whether they are a normal part of the individual's compensation package.

Comment: WAC 192-150-115. "Usual" should include all agreed upon pay raises or benefits, even if never actually paid to the claimant.

Reasons Not Incorporated in Final Rule: The term "usual" means "commonly encountered or experienced." In the context of this section which refers to "usual compensation," it does not include raises or benefits that have been promised or agreed upon but which were never actually received by the claimant.

Comment: WAC 192-150-115. "Usual compensation" should be more of a historical accounting of what a person has earned.

Incorporated in Final Rule: The term has been defined to include amounts actually paid to the claimant. If the separation occurs before the claimant is paid for his/her most recent job, it includes the compensation agreed upon at the time of hire.

Comment: WAC 192-150-115. For the voluntary quit to be good cause, the claimant should quit within "reasonable proximity" of the time the event took place and not six months later. The Department should clarify the term "reasonable proximity."

Reasons Not Incorporated in Final Rule: Although early versions of the draft rules incorporated "reasonable proximity" language, it was ultimately removed from the final version. The statute does not contain this requirement. There will be circumstances in which individuals facing a 25% or greater cut in pay will continue working while seeking a new job. In applying this section, the department will determine whether the reduction in pay was the primary factor leading to the job separation.

Comment: WAC 192-150-115. When a claimant files an application for benefits, the employer should produce the following items: 1099 forms, W-2 forms for the employees, and copies of their income tax returns to see what ordinary and necessary business expenses they are claiming as a part of their employees' compensation.

Reasons Not Incorporated in Final Rule: Requiring documentary evidence from an employer (such as, 1099 forms, W-2 forms for the employees, a copy of income tax returns) to establish a worker's usual compensation is unnecessarily burdensome. The Department will continue to use wage and hour reports filed with the department to determine a claimant's compensation. If the claimant receives compensation in a form other than wages, fact finding with the employer and claimant will be used to determine its value.

Comment: WAC 192-150-110. The employer's actions must be the cause of the reduction in usual compensation.

Incorporated in Final Rule: Context makes clear that the action resulting in the reduction in compensation must have been taken by the employer. An employee may not initiate action to reduce his or her pay and then qualify for benefits based on such action.

Comment: WAC 192-150-110. The proposed phrase "anticipated receiving" in the context of compensation is too vague. Suggest that the phrase "or were contracted to receive" be substituted.

Incorporated in Final Rule: The phrase "anticipated receiving" was deleted from the final rule. Reference is now made to amounts actually received by the claimant.

Comment: WAC 129-150-110. The percentage of reduction should be based on a claimant's most recent pay grade, salary or other benefits they have received or have agreed to, not necessarily on a "permanent" basis. Language in this section that clarifies that temporary raises or other compensation for performing temporary duties are excluded from usual work should be stricken.

Reasons Not Incorporated in Final Rule: Although the percentage of reduction will be based on the claimant's most recent pay grade or salary, it will not include temporary raises for performing temporary duties. By definition, temporary means "for a limited time." Individuals who accept new duties for a temporary increase in pay will not have good cause for leaving work under this section after returning to their usual duties and pay.

Section 4. RCW 50.20.050(2)(b)(vi) Quit due to 25% or greater reduction in hours.

Comment: The purpose of this particular statute was to provide some specificity to the degree of reduction. It was the intent of this statute to preserve benefits for people but to raise the bar from 10 percent to 25 percent.

Incorporated in Final Rule: The amount of reduction must be 25% or more to constitute good cause under this subsection. This supercedes prior case law which set the standard as 10-15%.

Comment: WAC 192-150-120. "Usual hours" are those hours the individual accepted at the time of hire. If a claimant accepted work for 70 hours a week, and it's typically a 20 or 40 hour per week job, the claimant is taking the job because of those hours.

Incorporated in Final Rule: The rule provides that "usual hours" will include the hours agreed on by the claimant and employer at the time of hire.

Comment: WAC 192-150-120. The "pay period" should be the time period used as the measuring value in determining percentage of reduction.

Reasons Not Incorporated in Final Rule: Some jobs include wage or salary schedules in which payment may be significantly higher or lower from one pay period to the next. It is more realistic to look at a longer period of time to determine if wages have been reduced by 25% or greater.

Comment: WAC 192-150-120. The legislative intent was to look at the base year. The criteria for determining a 25% reduction in compensation or in hours should be closely matched.

Incorporated in Final Rule: Legislative intent cannot be determined on the evidence at hand. However, reductions since the beginning of the base year will be considered when the department determines whether there has been a reduction of 25% or more in compensation or hours.

Comment: WAC 192-150-120. The problem in using the base year as a measure is that the claimant could have two or three different base year employers or more. The statute is really talking about the separating employer.

Reasons Not Incorporated in Final Rule: The rule provides that the department will look at the hours of work agreed upon by the claimant and the employer. If those hours remain the same, an individual will not qualify based on reductions from prior base year employers.

Comment: WAC 192-150-120. The terms of the 25 percent reduction in hours should be based on the individual rather than the industry norms.

Incorporated in Final Rule: See above. The rule provides that "usual hours" will include the hours agreed on by the claimant and employer at the time of hire.

Comment: WAC 192-150-120. The "hours" piece is a little more difficult in which to apply a "reasonable person standard." Sometimes an employer does not share their schedule and an individual may not know whether or not they are going back to work full-time.

Reasons Not Incorporated in Final Rule: In determining whether good cause for quitting work exists, the department will use the reasonably prudent person standard. In this context, we would consider how long a reasonably prudent person would be expected to continue working with reduced hours before quitting work. Individuals are also required to take reasonable steps to preserve their employment. If the employer has not indicated the duration of the reduction in hours, a reasonable step would be for the claimant to inquire.

Comment: WAC 192-150-120. The Department should clarify the proposed term "reasonable proximity" when determining if the actual quit occurred within "reasonable proximity" to the 25 percent or greater reduction in hours.

Reasons Not Incorporated in Final Rule: Although early versions of the draft rules incorporated "reasonable proximity" language, it was ultimately removed from the final version. The statute does not contain this requirement. There will be circumstances in which individuals facing a 25% or greater cut in hours will continue working while seeking a new job. In applying this section, the department will determine whether the reduction in hours was the primary factor leading to the job separation.

Comment: WAC 192-150-120. The rule should include piece rate jobs along with seasonal jobs in determining what, in those circumstances, will be a 25 percent or greater reduction in hours.

Incorporated in Final Rule: Language has been added to the rule addressing seasonal jobs and those paid for piecework.

Comment: Add "unless it was part of your hiring agreement" to WAC 192-150-120(4).

Reasons Not Incorporated in Final Rule: The percentage of reduction will not include temporary overtime. By definition, temporary means "for a limited time." Individuals who work increased hours on a temporary basis will not have good cause for leaving work under this section after returning to their usual hours of work.

Section 4. RCW 50.20.050(2)(b)(vii) Quit due to change in worksite causing increased distance or difficulty of travel.

Comment: WAC 192-150-125. An attempt should be made to make distance and difficulty of travel quantifiable. Because the 25 percent level was chosen for compensation and hours, an increase in difficulty of travel and distance should also be 25 percent.

Reasons Not Incorporated in Final Rule: Had the legislature wanted to quantify this section in this manner, they could have done so. However, quantifying distance and difficulty of travel in terms of percentages is almost impossible. It can depend on factors such as occupation, labor market area, availability of public transportation, etc. Adding a set mileage limit (e.g., 25 miles) is also not practical. Twenty-five miles in the Seattle area may increase travel by well over an hour, but only half an hour for residents in rural areas.

Comment: WAC 192-150.125. If a claimant accepts a transfer (such as transfer from a position in the state of Washington to the state of Montana), the claimant cannot quit because they accepted the job knowing where it was located. In other words, if a claimant accepts the job, then says it's too much of a commute, that person should not be qualified for benefits.

Incorporated in Final Rule: The statute is clear that the worksite must have changed for the claimant to establish good cause under this section. If the claimant knew the job location when the job was accepted, they do not have good cause under this section if they quit because the commute is outside the norm. This marks a change from the prior statute.

Comment: WAC 192-150-125. The labor market area should not be a determining factor as to what constitutes a material increase in a claimant's commute distance. Some individuals are capable of commuting greater distances than other individuals.

Reasons Not Incorporated in Final Rule: The statute provides good cause if, after the change in worksite, the commute was greater than customary for workers in that job classification *and labor market*. References to "labor market" were not eliminated from the final rule.

Comment: WAC 192-150-125(1). The addition of the phrase "or other circumstances beyond your control" to the introductory section is not acceptable to the business community. The inclusion of this language creates a far broader allowance then intended by the legislature.

Reasons Not Incorporated in Final Rule: As originally proposed, the sentence would have read "The location of your employment must have changed due to employer action or other circumstances beyond your control." The objectionable phrase was removed because it is clear, based on the manner in which benefits are charged, that the statute was intended to apply to worksite changes imposed by the employer.

Section 4. RCW 50.20.050(2)(b)(viii) Quit due to deterioration in worksite safety.

Comment: WAC 192-150-130. Safety is of the utmost importance. Safety hazards on the job should be corrected immediately. If there is safety deterioration or a danger, and the claimant quits as a result of that danger (or the perceived danger) and the employer has not fixed it, the employer should be charged for the benefits.

Incorporated in Final Rule: The regulation provides that, when the safety issue creates a risk of serious bodily injury, the employer must take immediate steps to correct the situation. Charging of benefits is determined under RCW 50.29.021.

Comment: WAC 192-150-130. The key for this statute is that the claimant reports the safety issue to the employer so that the employer has a chance to correct it. The intent is trying to enhance the responsibility of both parties to the transaction.

Incorporated in Final Rule: The regulation provides that, to establish good cause, the claimant must notify the employer of the safety issue and give the employer a reasonable period of time to make corrections.

Comment: WAC 192-150-130(2)(b). The Department should continue to use the "person-of-normal-sensitivity" standard when dealing with safety incidents.

Reasons Not Incorporated in Final Rule: The department will use the "reasonably prudent person" standard in this and other voluntary quit situations. The "person of normal sensitivity" standard, while it may be similar, is not defined in case law.

Comment: WAC 192-150-130. A presumption is that a reasonable person (the employer) is going to be operating under the Washington Industrial Safety and Health Act (WISHA) standards that apply to the workplace. The intent of this statute wasn't to insert Employment Security into making safety determinations made by the Department of Labor and Industries (L&I).

Reasons Not Incorporated in Final Rule: State law requires employers to operate under WISHA guidelines, and a claimant accepting a new job can expect that an employer does so. If the claimant then discovers that the worksite is unsafe, the department will consider the safety to have deteriorated. However, the department does not intend to interfere with safety determinations made by L&I. Since the claimant is the moving party in a voluntary quit, the

burden of showing good cause for leaving will be on the claimant based on the weight of evidence.

Comment: WAC 192-150-130. "A reasonable period of time" to correct the job condition must be consistent with applicable local, state or federal regulations and not based solely on what seems a reasonable period of time to the individual.

Reasons Not Incorporated in Final Rule: The average worker should not be expected to know all local, state, or federal regulations that apply to a worksite. The standard in the regulations is whether a reasonably prudent person would be expected to continue working under the conditions at issue.

Comment: WAC 192-150-130. "Reasonable" should be significantly determined by WISHA requirements. If there is a life safety issue, a reasonable period of time to correct the situation is not two weeks. L&I has established time frames defining a reasonable period of time for an employer to comply with a safety violation. A citation from L&I is not needed. However, a citation will provide clear evidence that there is a problem. Look at what WISHA requirements are, document what the employee did, what the employer did or did not do, and take each one of these cases individually.

Reasons Not Incorporated in Final Rule: Although each situation will be addressed on a case by case basis, the department will not rely solely upon L&I to determine whether a safety issue exists. If there has been a citation issued to the employer, it will be part of the fact finding process. The rule provides that the employer must make a correction if a citation has been issued. However, once contact with L&I is established, it might take months for an inspection to be performed, citation issued, and the appeal process finished. There is nothing in ESD law that requires a claimant to continue working while L&I completes its investigation or until a citation is issued.

Comment: WAC 192-150-130. The Department should not use the WISHA inspections by L&I as a standard. Due to workload, it can take L&I staff days, weeks, or even months to complete an inspection.

Incorporated in Final Rule: See previous response.

Comment: WAC 192-150-130. If an employer asks an electrician to go into a hot box, or asks a construction worker to go up on a roof, and the employer does not have the safety gear, we [union] encourage our apprentices or journeymen to not do those illegal acts. If an employer is violating the state law, or other safety rules, the worker should not be penalized for quitting their job and making their employer do what they are supposed to do.

Incorporated in Final Rule: The regulation and statute only require that the claimant provide the employer a reasonable period of time in which to correct the situation. When the violation poses a risk of serious bodily injury, the correction must be immediate. Nothing in the statute or rule requires the claimant to violate known safety rules until the employer makes a correction.

Comment: WAC 192-150-130. The safety violations are very definitely case specific. Some of the violations are going to be immediate and some of them, whether they were less serious or less consequential, are going to be over a longer period of time. There has to be some kind of proof. Even a complaint to the police department is not evidence. There needs to be some kind of admission or proof to a "competent authority."

Reasons Not Incorporated in Final Rule: While the burden is on the claimant to establish good cause for leaving work, nothing in the statute requires that the employer make an admission to a competent authority that a safety violation has occurred.

Comment: WAC 192-150-130. There is no reason to require special kinds of proof in these situations (safety violations). Give examples in the benefit policy guide of ways to evaluate credibility.

Incorporated in Final Rule: Each case will be determined on its own merits. The department has guidelines for staff to use in determining whether good cause for leaving work can be established.

Comment: WAC 192-150-130. An issue of worksite safety should be verified or substantiated, not just an allegation.

Reasons Not Incorporated in Final Rule: While verification or substantiation of the violation is not required, the department will assess whether the claimant has established its existence by a preponderance of evidence.

Comment: WAC 192-150-130. The violation must be directly connected to the employee's position. For example, if an office worker becomes aware that there was safety violation in the production section of the company, the violation would not apply to the office worker's position.

Reasons Not Incorporated in Final Rule: The statute speaks to "worksite" rather than "workstation." There are some circumstances in which a safety violation at the worksite could create a hazard for workers located in another part of the building. The standard in making a determination will be whether a reasonably prudent person would have continued working in the presence of the safety violation.

Comment: WAC 192-150-130. If an individual identifies a potential safety hazard and the company has done it that way for years, but it's been wrong, and the employer denies there is a safety issue, automatically the Department must make a determination.

Reasons Not Incorporated in Final Rule: The department will determine whether a claimant had good cause to leave work. Information from both the claimant and employer will be considered. The standard is not how long the safety hazard has been in existence, or whether other employees have continued to work under hazardous conditions. The standard is whether a reasonably prudent person would continue working in the presence of the potential hazard.

Comment: WAC 192-150-130. The circumstance in which an individual arrives at a job site and finds that the employer lacks the requisite safety equipment falls under the existing statute which permits an employee to refuse an offer of work if the offer of work is not suitable. The burden of proof is on the employer that they corrected the hazard within a reasonable period of time.

Reasons Not Incorporated in Final Rule: An attachment to the employer exists once the claimant has accepted the job. This normally occurs before the claimant reports to the worksite. Even if the separation occurs before any work is actually performed, it is considered a voluntary quit rather than a work refusal. Good cause will be determined based on the statute and regulation. In those cases where the job has not yet been accepted (e.g., referral of union members), a determination will be made as to whether the claimant refused an offer of suitable work. The provision that an employer has a reasonable period of time in which to make corrections applies to voluntary quits, not to work refusals.

Comment: WAC 192-150-130. It could be a deterioration of the individual's worksite safety even if it's the unsafe act of another employee or even the employees of another employer that are causing the deterioration. The burden needs to be on the employer to show that they acted within a reasonable period of time.

Incorporated in Final Rule: The statute and rule consider the safety of the worksite, not who is creating the unsafe conditions. Under the statute, the claimant need only inform the employer of the unsafe conditions and provide the employer a reasonable period of time to make corrections. If the employer is unable or unwilling to make corrections within a reasonable time period, good cause is established.

Comment: WAC 192-150-130(2)(b). The definition for "reasonable period of time" should not include "in the presence of the condition at issue."

Reasons Not Incorporated in Final Rule: This phrase clarifies how the reasonably prudent person standard will be applied in these situations.

Comment: WAC 192-150-130(2)(b)(i). The proposed rule should clarify that imminent danger can be physical, psychological and emotional. Harm also need not be physical, but can also be psychological and/or emotional.

Reasons Not Incorporated in Final Rule: The rule requires immediate correction of health or safety issues that present imminent danger of serious bodily injury or death. Although safety issues can present a risk to an individual's psychological or emotional health, the risk usually does not require immediate correction. In such cases, a reasonable period of time will depend on the safety issue in question.

Comment: WAC 192-150-130(2)(b)(i). For health or safety issues that present imminent danger, reference to "serious bodily injury or death to any person" should be stricken and replaced with "or unsafe working conditions." Further, unsafe working conditions should mean "undue risk of bodily injury or serious permanent disfigurement, or which could cause a

significant loss or impairment of the function of any bodily part or organ whether permanent or temporary."

Reasons Not Incorporated in Final Rule: The term "unsafe working conditions" is broader than situations which present a risk of serious bodily injury or death. There are other unsafe conditions that present a longer term risk to the worker and which constitute good cause for leaving work. Narrowing the definition as suggested would limit the application of this statute to only those situations that could cause bodily injury or serious permanent disfigurement. In addition, Section 6 refers to actions that cause "serious bodily harm." To maintain continuity, the department has elected to use "serious bodily injury" as opposed to "unsafe working conditions."

Comment: WAC 192-150-130(2)(c). We support the addition of the language to the definition of "serious bodily injury" to include the language "whether permanent or temporary." Workers should not be required to risk temporary impairment of bodily function in order to qualify for benefits.

Incorporated in Final Rule: Examples include safety violations that could lead to a broken limb. While the injury is not permanent, nothing in the statute requires a claimant to work under such a violation.

Section 4. RCW 50.20.050(2)(b)(ix) Quit due to illegal activities at the worksite.

Comment: WAC 192-150-135. The term "illegal activities" should include violations of both civil and criminal law. In the case of civil violations (such as sexual harassment, discrimination), the employee should be required to report these violations to the employer so that the employer can fix the situation. The employee should be required to inform the employer unless that requirement might clearly jeopardize the safety of the individual or be contrary to other laws (e.g., whistleblower protection laws).

Incorporated in Final Rule: The final rule provides that an illegal activity may be civil or criminal. The claimant is not required to notify the employer if the employer is the individual conducting the illegal activity **and** notification could jeopardize the claimant's safety or is contrary to other laws (such as whistleblower laws). This exception preserves the safety and well-being of the worker and is consistent with other laws.

Comments: Referring to WAC 192-150-135.

- An issue of an illegal activity should be verified or substantiated, not just an allegation.
- If it's illegal, usually the court has to make that determination. A person can be acquitted of the charges.
- It cannot be just a perception of an illegal activity. Mere assertions do not establish the existence of illegal activities in the individual's worksite. Credible evidence must support allegations of illegal activities at the individual's worksite.
- More than an allegation is needed. Some kind of proof is needed that there was an illegal activity. If you are going to limit a benefit denial to a situation where there's admission to a

competent authority or a conviction, maybe it ought to go the other direction as far as allegations against an employer.

Reasons Not Incorporated in Final Rule: The standards of proof for criminal convictions and unemployment insurance eligibility decisions are different. The standard for the latter is preponderance of the evidence. Nothing in the statute requires there to be a criminal conviction or court ruling before good cause under this section can be established. As the moving party, the burden will rest with the claimant to show by a preponderance of evidence that an illegal activity occurred and the employer failed to correct it within a reasonable period of time.

Comments: Referring to WAC 192-150-135.

- A conviction is not necessary. And it's very unlikely that an employer is ever going to admit they had a hostile workplace. If an individual can show they had a reasonable need to quit a job because of a safety violation, sexual harassment or discrimination, then it's a different standard than having to convict an employer of those activities.
- The Department does not have to prove criminal intent. The party that prevails is the one that has the more persuading evidence.
- Other agencies are going to be involved in determining the validity of an allegation. L&I is responsible for employment standards such as wages, hours, and meal breaks. The issue is: Was the illegal activity reported? Was it acted on? Was there some other activity? The department does not need to go to court.

Incorporated in Final Rule: See above response.

Comment: WAC 192-150-135. The employee can "indirectly" inform the employer of the illegal activity through WISHA, the Human Rights Commission or some other method.

Reasons Not Incorporated in Final Rule: The claimant is required to notify the employer of the illegal activity. The only exception is when the employer is the individual conducting the illegal activity **and** notification could jeopardize the claimant's safety or is contrary to other laws (such as whistleblower laws).

Comment: WAC 192-150-135(3). Most employers have a standard rule or policy that, if there is something wrong, you would need to report it to a supervisor.

Incorporated in Final Rule: The term "employer" is defined to include the supervisor, manager, or other individual who could be expected to correct the illegal activity at issue.

Comments: Referring to WAC 192-150-135.

- This may be an area where the Department would circumvent the usual process. If an employer is engaged in illegal activities, the claimant may not go through the regular reporting channels. If a claimant's immediate supervisor was conducting an illegal activity, they may not want to report to that person, they may have to report to outside channels.
- The example used during the legislative session was: if an employer has a methamphetamine lab in the basement, is the worker required to tell that employer that he has a

methamphetamine lab in the basement and provide the employer an opportunity to remove it? Under the statute, there's no room or opportunity that it would be futile, that it would be unsafe. There is any number of reasons why an individual might not be able to give their employer an opportunity to remove the illegal activity or condition.

- The rules should not impair an employee's rights as a "whistleblower," or his/her own safety, by telling the employer that he (the employer) is committing a crime.
- The statute is silent on illegal activities caused by the employer. It's not talking about illegal activities that the employer is doing. It's talking about illegal activities occurring at the worksite. If drugs are being sold at the worksite by a co-worker or by individuals not involved at the worksite, it's a worker's obligation to report that to the employer. It was not the legislature's intent to cover-up or protect illegal activities of employers or anyone else. It was not the intent to make employees report illegal activities caused by or performed by employers. The law is absolutely and completely silent on employers causing or performing illegal activities. The rules should clarify that and address that employees are not reporting illegal activities to their employer when the employer is causing and performing the illegal activity.

Incorporated in Final Rule: The claimant is not required to notify the employer if the employer is the individual conducting the illegal activity **and** notification could jeopardize the claimant's safety or is contrary to other laws (such as whistleblower laws).

Comment: WAC 192-150-135. The intent here is a very low standard on what constitutes an illegal activity. The legislature was not looking at keeping anyone in employment where they were engaged in an illegal activity. Err on the side of the person reporting the illegal activity.

Incorporated in Final Rule: The rule provides that a violation may be civil or criminal. The standard in determining eligibility for benefits will be whether a reasonably prudent person would have continued working in the presence of the illegal activity at issue.

Comments: Referring to WAC 192-150-135.

- In the event the circumstances surrounding the unlawful activities might result in danger to the employee or the denial of their rights under other laws, the employee must be required to report the illegal activities to a law enforcement agency or other regulatory agency in order to receive benefits.
- The statute doesn't specify an "employer's" illegal activity. It says "illegal activity." What about sites like those of us who are in construction? We are at a job site with five, six, or seven trades. We can't control other employers. Wouldn't it make sense that if it's an illegal activity, and if it's at a level for an individual to quit their job, that it would make sense to report it to whatever agency, because that would give the backup to the claimant?
- The reasonable person standard should include notification to a third party.

Reasons Not Incorporated in Final Rule: Nothing in the statute requires notification by the claimant to a third party. Instead, notification of the employer is required. A narrow exception is carved out in the final rule for situations in which the employer is conducting the illegal activity AND notification to the employer would jeopardize the claimant's safety or is contrary

to other federal or state laws. The department's goal in implementing this legislation is to do so in a manner that does not produce an absurd result. Requiring an individual to preserve his or her rights to benefits by taking an action that could jeopardize his or her safety would produce such an absurd result.

Comment: WAC 192-150-135. Nothing in the statute would suggest special kinds of proof would be needed to prove illegal activities. In the benefit policy guide, the Department might want to give examples of ways to evaluate credibility. But in the rules themselves, when the case has gone to hearing, you would simply decide those questions as you would any other case, based on what is decided at the hearing.

Incorporated in Final Rule: The standard for this subsection is the same as for the others within RCW 50.20.050. The department will determine, based on a weight of the evidence, whether the claimant acted as a reasonably prudent person in quitting work.

Section 4. RCW 50.20.050(2)(b)(x) Quit due to change in usual work that violates the individual's religious convictions or sincere moral beliefs.

Comments: Referring to WAC 192-150-140.

- If the employer did something that caused the problem, that is where the burden should be.
- This should be based on actions of the employer changing the work and not the employee's change in beliefs.
- This section should be solely limited to the actions by the employer. By charging these benefits to the separating employer, the legislature clearly intended that these quits be "caused" solely by employer actions.

Incorporated in Final Rule: The rule clarifies that the change in usual work must result from actions taken by the employer.

Comment: WAC 192-150-140. If an individual reports to work and determines that the work is not suitable for them for reasons of health, safety, or morals, under the current [pre-2004] statute they are refusing an offer of new work. The offer of new work is not suitable work. If an employee is now asked to perform work that violates his or her religious or moral convictions that pre-existed, the claimant should be permitted to claim benefits because the work was changed.

Incorporated in Final Rule: Under the prior law, if the individual had accepted a job but quit prior to performing any work, the separation would still have been considered a voluntary quit, not a work refusal. The individual could establish good cause for the quit if the work violated his or her health, safety, or morals. Under the law as amended, if the claimant quits because the work now violates his or her pre-existing beliefs, it would still be considered a voluntary quit.

Comment: WAC 192-150-140. What did the employer tell an employee at the time of hire about the work? Having commenced work, if the employee finds that the work doesn't meet the

work represented by the employer, and it violates a claimant's religious convictions or sincere moral beliefs, then the claimant should be permitted to claim benefits.

Incorporated in Final Rule: The rule provides that the claimant will not have good cause for quitting work under this section if they knew of the objectionable aspects of the work at the time of hire. Conversely, if they did not know of the objectionable aspects until they began work, good cause could be established because it was not agreed upon by the claimant and employer in the hiring agreement.

Comment: WAC 192-150-140. "Sincere moral beliefs" are coextensive with the word "creed" that appears in RCW 49.60 as being a basis against which persons cannot be discriminated. Moreover, under state law, there is an obligation for employers to accommodate the religious beliefs of an individual if they make such a request. Also, the term "political ideology" should be considered in the definition of what constitutes a sincere moral belief.

Reasons Not Incorporated in Final Rule: "Creed" may be considered as synonymous with "religious or sincere moral beliefs". Other sections of state and federal law establish penalties for employers who fail to accommodate an individual's religion or creed under certain conditions. However, this is outside the authority of this department to investigate or otherwise enforce. The department will limit its fact finding to whether the employer changed the claimant's usual work in a manner that violated the individual's religious or moral beliefs.

Comment: Referring to WAC 192-150-140(2).

- Proposed subpart (2)(c) that requires the claimant to notify the employer that the work violates their religious or sincere moral beliefs, unless doing so would be futile, should be deleted. This notification is not required by statute.
- Subpart (2)(c) of the proposed rule adds a requirement that the individual notify the employer. This provision is not required by the statute and should be omitted for the reasons set out at length in the article [*Workplace Mythologies and Unemployment Insurance: Exit, Voice and Exhausting All Reasonable Alternatives to Quitting,* 31 Hofstra L. Rev. 459 (2002)]. Though notification/exhaustion requirements seem plausible at first blush, they ignore the power dynamics of the workplace; workers' legitimate concerns to avoid being fired, and the valid concern that some employers will retaliate against workers who raise concerns.

Reasons Not Incorporated in Final Rule: If an employer changes the individual's usual work in a manner that now violates the individual's religious or moral beliefs, it would be reasonable for the claimant to so advise the employer in the event that another change can be made. The claimant is not required to notify the employer when doing so would be futile.

Comments: Referring to WAC 192-150-140(3).

- This section should include a two-month time frame to accommodate workers who have undergone a conversion in their belief structure and to give workers adequate time to attempt to find alternative employment.

- Give claimants a reasonable amount of time to consider their options after a change in work conditions. There are many situations where an individual will continue to work while reviewing their options.
- All of proposed subpart (3)(a) through (c) should also be deleted, as the statute does not require this. This section identifies reasons why a claimant would not have good cause for quitting work if the change violates religious or sincere moral beliefs. Again, claimants should have a reasonable amount of time to consider their options after a change in work conditions.
- Remove subpart (3)(a), "you are inconsistent or insincere in your objections," and add "beyond a reasonable period of time" to subpart (3)(c). Subpart (3) (c) would read: "You knew of the objectionable aspects of the work at the time of hire, or you continued working under the objectionable conditions beyond a reasonable period of time.
- Subpart (3)(c) disqualifies a claimant who "continue(s) to work under the objectionable conditions." It is unfair to workers to require them to exhaust all alternatives to quitting in some instances, but penalize them if they do not quit immediately in others. Such an approach requires workers to have an unrealistic level of sophistication about the UI statute.

Incorporated in Final Rule: The language in (3)(c) is amended to read: "You knew of the objectionable aspects of the work at the time of hire, or you continued working under the objectionable conditions longer than a reasonably prudent person holding similar beliefs would have continued." This language allows flexibility for individuals while they seek other employment or attempt to negotiate with their employer for a change in working conditions, yet precludes qualification by individual's whose primary reason for leaving work was something other than the change in working conditions. The other language in subsection (3) remains as it is provides guidance as to how the department will interpret this statutory provision.

Comment: WAC 192-150-140. Application of subsections (2)(c) and (3) will invite speculation by adjudicators and will be impossible to adjudicate uniformly.

Reasons Not Incorporated in Final Rule: These criteria will be applied on a case by case basis and provide guidance to staff determining whether an individual may qualify for benefits under this section.

Comment: WAC 192-150-140. The proposed rule does not outline what kind of changes in "usual work" would violate religious or sincere moral beliefs and the phrase "or otherwise result from factors beyond the claimant's control" should be deleted as it is too broad and vague.

Incorporated in Final Rule: The phrase "or otherwise result from factors beyond the claimant's control" has been deleted from the final rule. The benefit charging provisions related to this section make clear that the change in work must have resulted from action taken by the employer. The rule does not outline the changes that could potentially violate an individual's religious or moral beliefs, as these will vary widely. Eligibility decisions will be made on a case by case basis.

Comment: WAC 192-150-140. Under "usual work that violates religion or sincere moral beliefs", the word "religion" should be changed to "religious."

Incorporated in Final Rule: The requested change has been made.

Comment: WAC 192-150-140. The Department should define "sincere moral beliefs."

Reasons Not Incorporated in Final Rule: The department does not seek to define either "sincere moral beliefs" or "religious beliefs." Flexibility must be maintained to accommodate the wide variance of beliefs held by members of the general public. The sincerity of a claimant's beliefs will be assessed on a case by case basis.

Section 4. WAC 192-150-150 When is a separation considered a refusal of new work?

Comments:

- The proposed rule references "other conditions of work." The legislature specifically removed the commissioner's discretion to add other voluntary quit provisions based on the deterioration of "other working conditions." All references to other conditions of work should be stricken.
- The intent of the legislation was to limit the Department's discretion. This rule completely changes the framework of the new voluntary quit law.

Reasons Not Incorporated in Final Rule: Shortly after 2ESB 6097 was signed into law, the U.S. Department of Labor advised the department that Section 4 of the bill created a potential conformity issue with federal law**.** Section 3304(a)(5)(B), of the Federal Unemployment Tax Act (FUTA) requires, as a condition of employers in a state receiving credit against the federal unemployment tax, that the state not deny unemployment compensation to any otherwise eligible individual for refusing to accept new work "if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality." The term "new work" is defined as:

> (3) An offer by an individual's present employer of:
> (a) Different duties from those the individual has agreed to performing the existing contract of employment; or
> (b) Different terms or conditions of employment from those in the existing contract.

The department had the option of refusing to accept USDOL's definition of "new work," thereby creating a federal conformity issue and placing the state's funding at risk. In the alternative, the department sought to implement the law in a manner that was consistent with both federal and state law. Since RCW 50.20.110 also prohibits the denial of benefits to individuals who refuse new work that is substantially less favorable than the prevailing standard, the final rule adopts a definition of "new work" that is consistent with federal guidelines. The rule applies to changes in working conditions that meet the definition of new work, where the claimant is unable to establish good cause under RCW 50.20.050, but the new work is substantially less favorable. In

such cases, the separation will be treated as a refusal of new work under RCW 50.20.080. Although an employer is normally not considered an interested party to a work refusal decision, the rule provides that the employer is an interested party under these conditions in order to provide the employer with appeal rights.

Comments:

- When a separation is considered a refusal of new work, the Department should allow a two-month time frame (or "a reasonable amount of time") before the workers are considered to have accepted the new conditions of work. This would protect a worker who would like to leave immediately but cannot due to financial reasons, or lack of alternative work in the community, or for not knowing immediately that they have the right to leave the job for good cause.
- Subpart (5) requires the worker to quit immediately. If an individual does not quit immediately, that might be an indication that they are quitting for personal reasons, though that is not necessarily so. If, in fact, they are quitting for the stated reason, the passage of time does not convert the work-related reason into a personal reason.

Reasons Not Incorporated in Final Rule: The purpose of this rule is to avoid a conformity issue by outlining narrow conditions under which a job separation will be treated as a refusal of new work. As defined, a claimant's eligibility will be determined under RCW 50.20.080 rather than RCW 50.20.050. Under existing statute and case law, there is no provision for a period of "try out" employment. An individual is not required to accept an offer of unsuitable work. However, if they do accept unsuitable work, they do not have good cause for leaving except as provided in law. The rule provides that an individual may refuse the new work but, in most cases, if the individual works under the new conditions he or she is considered to have accepted the new work.

Comment: Subsection (4) seems to contain a presumption that a 10 percent reduction of hours or wages is not substantially less favorable. It is clear that the legislature presumed that a reduction of less than 25 percent is not substantially less favorable or they would not have set the level at that amount. The rule should read "if a reduction in a claimant's pay or hours is less than 25 percent, the Department should presume that this is not substantially less favorable and adjudicate the separation under RCW 50.20.050(2)." In addition, a claimant should not be able to overcome this presumption by providing additional information to the Department to support a finding that the job was not suitable as provided in RCW 50.20.110.

Reasons Not Incorporated in Final Rule: Prior to the passage of 2ESB 6097, case law had already established that a reduction of 10% or less was not substantially less favorable. The new law sets the standard as 25% or less. This rule applies only to situations in which a claimant cannot establish good cause under the voluntary quit statute, but there is a question as to whether the employer has changed the conditions so there is an offer of new work. By definition, this would apply to those cases where an employer reduces wages or hours by less than 10%. Subsection (4) simply provides that the department will presume that a reduction of 10% or less is not substantially less favorable; benefits would be denied accordingly. We will limit our determination of whether the new work is substantially less favorable to cases involving

reductions of 11-24%. Subsection (4) allows the claimant to provide information establishing that the job was otherwise unsuitable under RCW 50.20.080.

Comment: The definition for "substantially less favorable" should not include the statement: "or the work would have a significantly unfavorable impact on you."

Reasons Not Incorporated in Final Rule: Unemployment Insurance Program Letter 41-98 provides that an offer of new work is substantially less favorable if it does not meet the prevailing conditions for that occupation and labor market or would have an "appreciable adverse effect" upon the claimant. The rule replaces "appreciable adverse effect" with "significantly unfavorable impact" to preserve the intent of this phrase while simplifying the language.

Comments:

- The definition for "substantially less favorable" states that the work must be materially reduced below the standard under which the "greatest number" of individuals in your occupation and labor market area customarily work, or the work would have a significant unfavorable impact on you." It appears that the greatest number would equal 100 percent. The Department should identify a standard such as 70 percent.
- The greatest number in the definition for "substantially less favorable" means the greatest majority not 100 percent.
- The greatest number in the definition does not mean 100 percent.

Incorporated in Final Rule: The term "greatest number" has been replaced with "majority".

Section 6. RCW 50.04.294 Misconduct and Gross Misconduct defined.

Comment: WAC 192-150-200. Willful or wanton misconduct must have concrete impact on the employee's work, a fellow employee's work, the employer's business interests, or pose a risk or harm to the employer's interest.

Incorporated in Final Rule: The final rule clarifies that, to constitute misconduct or gross misconduct, the action resulting in the claimant's discharge must be connected with their work. The action must also cause harm or create the potential for harm to the employer's business.

Comments: Referring to WAC 192-150-200.

- The old law is repealed and the new misconduct definition does not require harm to the employer; it requires four substantially different levels of qualification for misconduct. It throws out old case law. Because the law no longer requires harm to the employer's business, the case law prior to this is probably not all that accurate and new case law on misconduct will have to be developed. The legislature was so specific to not only define the four areas of misconduct, but to further expound on examples they considered to be misconduct that do not have harm to the employer.
- The law does reference substantial harm to the employer's ability to do business, but only under violations of law by the claimant while acting within their scope of employment.

There's a distinction between those things that are required to have harm and those that aren't.

- This was intended as a significant policy change that the legislature enacted. The department should not pursue a tact that would have employers establish "harm" when the legislature specifically altered the entire definition of misconduct in the legislation.
- This was a specific legislative enactment intended to address both previous statutory and case law situations. Existing case law would apply to previous claims. The new statute is intended to change the statutory and case law situation that had developed up until now. The rules and interpretations should take that into account.
- If harm to the employer's interest is required under current case law, we can fall back on what's currently being done and use that as the base.
- The new statute is a marked departure from prior legislative or judicial formulations of misconduct. In the construction of the misconduct statute that was laid down by the State Supreme Court in *Macey,* harm to the employer was no longer an element of the definition of misconduct. With the new misconduct statute, harm to the employer is an element that is only found in one form of willful or wanton behavior that is enumerated by the legislature in Section 6, subpart (2)(g). The exclusion of that standard in all other provisions of the statute evidences a legislative intent to apply a "harm to the employer standard" only found in subpart (2)(g). Because the legislature deliberately eliminated provisions placed into the statute after the *Macey* decision, harm to the employer is not a statutory provision recreated here except in subpart (2)(g).
- A key thread in both the old and new law is that the rule or policy that an employee violates has to be reasonable. If the employer's rule is reasonable and the employee violates it, then that's misconduct. You don't have to show harm or the potential for harm to the employer.

Reasons Not Incorporated in Final Rule: Given parallel comparison in the statute, if harm to the employer was removed from misconduct, it appears that the statute would have clearly stated "harm to the employer is not required." Because this language is not there, all existing case law still stands, and the nexus to the employment is still required. The rule clarifies that harm, or potential for harm, to the employer is needed to qualify as misconduct and that the claimant's action must be work-connected. Case law ties harm to the employer. The rule notes that the harm can be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale. The actions cited in the statute as constituting misconduct all cause harm or create the potential for harm to the employer. In addition, all are modeled on case law developed under the prior statute which included the harm requirement. Subsection (2)(g) refers to actions that "substantially harm" the employer's business, which is a higher standard than "harm." The requirement that the action must result in harm or create the potential for harm to establish misconduct remains in the final rule.

Comments: Referring to WAC 192-150-200.

- To leave the employer in a position where he can subjectively weed out employees based on what he sees as potential harm to his/her company is opening the door to allow the employer to lay off any employee for a variety of reasons or fire them for a variety of reasons listed under misconduct and relieve themselves of their unemployment burden.

- The proposed language "create the potential for harm" is excessively broad, as even much appropriate action can create a slight risk of harm to the employer's interests. Some risks would be difficult to identify in advance.

Reasons Not Incorporated in Final Rule: Input from the sponsor of the bill indicates that the intent was to permit an employer to discharge an employee for misconduct when the employee's actions created the potential for harm to the employer's business. It is unreasonable to require an employer to wait until the harm or damage has occurred before they can show misconduct. The language "create the potential for harm" remains in the statute.

Comments: Referring to WAC 192-150-200.

- Harm "must create an obvious risk of significant damage to the employer's interest."
- The 25 percent standard has been a recurring theme throughout the legislation. That is probably a good place to start to determine the level of harm to the employer necessary to disqualify an individual from benefits.

Reasons Not Incorporated in Final Rule: The statute does not specify a degree of harm to the employer. The only reference to level of harm in the statute is in subsection (2)(g) which discusses "substantial harm" to the employer's business. The final rule does not establish or define "level of harm" to the employer (e.g., creates an obvious risk of significant harm) nor require that harm to the employer be 25 percent or greater.

Comment: The phrase "is not likely to result in serious bodily injury" should be deleted from WAC 192-150-200(3)(b).

Reasons Not Incorporated in Final Rule: Input was received that RCW 50.04.294, subsections (1)(c) and (3)(b), were incompatible. In comparing the two, it appeared the primary distinction was that the former references serious bodily injury while the latter does not. Therefore, the final rule clarifies the distinction between the two will be whether the negligent act could have resulted in serious bodily injury.

Comment: WAC 192-150-200. The statute overall has a lot of drafting problems. Subsection (1)(c) of the statute [RCW 50.04.294] is incompatible with subsection (3)(b). It would seem that 3(b) should control here if the intent of the legislation is not to expand the definition of misconduct to include negligence. That would be consistent with existing practice.

Incorporated in Final Rule: Subsection (3) was added to the final rule to distinguish between subsections (1)(c) and (3)(b) of the statute.

Comment: WAC 192-150-200(3). "Carelessness or negligence that causes or would likely cause serious bodily harm to the employer…." would be applicable to other than bodily harm. If an employee violates a safety rule that does not necessarily affect or have an impact on the body, but the company could suffer a penalty for failing to take certain steps; that would be applicable regardless of someone being injured or having significant financial impact on the employer.

Reasons Not Incorporated in Final Rule: RCW 50.04.294(1)(c) provides that misconduct includes "carelessness or negligence that causes or would likely cause serious bodily harm to the employee or a fellow employer." This section of the rule was added to distinguish between RCW 50.04.294(1)(c) and (3)(b). Other acts of negligence could fall under RCW 50.04.294(1)(d) which includes "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest."

Comment: WAC 192-150-200. In RCW 50.04.294(1)(c), there has to be a finding of a likely potential of serious bodily injury.

Incorporated in Final Rule: The final rule provides that subsection (1)(c) applies when the action results in serious bodily injury or a reasonably prudent person would know it is likely to result in serious bodily injury.

Comment: WAC 192-150-200. Under the carelessness and negligence that cause serious bodily harm to an employer or fellow employee, in the case of construction work, anytime an employee is not paying attention somebody could be put in harm's way. It's so broad. No matter what an employee was doing, they could be discharged for misconduct because they were not paying attention to what a coworker was doing.

Reasons Not Incorporated in Final Rule: The provision that carelessness or negligence that causes serious bodily harm constitutes misconduct is in the statute. The department lacks the authority to apply a different standard.

Comment: WAC 192-150-205(3). The proposed rule should read: "Carelessness or negligence means failure to exercise the care that a person in the claimant's circumstances usually exercises *that cause or would likely cause serious bodily harm to the employer or a fellow employee*; or carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest."

Reasons Not Incorporated in Final Rule: The proposed language refers to the result of the careless or negligent act, it is not part of the definition of the term. This language is already incorporated in the statute.

Comment: WAC 192-150-205(3). The definition of negligence omits the statutory requirement that the action be likely to cause serious bodily harm, or be severe enough to suggest intent or substantial disregard of the employer's interest. This omission should be corrected.

Reasons Not Incorporated in Final Rule: See previous response.

Comments: Referring to WAC 192-150-205.

- It appears gross misconduct swallows the entire rule so that everything can be gross misconduct.
- The law is so broad an employer could find just about anybody in violation of misconduct and therefore be off the hook in terms of having an employee eligible for benefits.

- Something that's gross misconduct should be a little more severe than misconduct. It should include a real close nexus to the act and the level of the act as well. Those have to be hand-in-hand in determining gross misconduct.
- The intent of this legislation was not to increase the number of reasons that an employer can discharge an employee. It's to clarify the definition for the determination of benefits.
- It's important the Department distinguish between the two disqualifications (misconduct and gross misconduct). The disqualification for misconduct has a lower standard from gross misconduct.

Incorporated in Final Rule: In statute, misconduct includes acts that are "willful" or "wanton", while gross misconduct includes criminal and "flagrant and wanton" acts. The prior law defined only misconduct. Wage credits could be canceled when a claimant was convicted of a work-connected felony or gross misdemeanor, but this did not necessarily require a discharge for misconduct. The distinction between misconduct and gross misconduct is new. In defining the terms "willful," "wanton," and "flagrant," the department's goal is to establish guidelines as to how the two levels of misconduct will be defined.

Comment: WAC 192-150-205. The Department's proposed definitions of "willful" and "wanton" are an unworkable standard for common sense enforcement. The definition of "willful" as "intentional behavior done deliberately or knowingly by the claimant where the claimant is fully aware that they are violating or disregarding the rights of the employer or co-worker" is redundant. If the behavior is deliberate or knowing, then the claimant can be presumed to be fully aware of it. At worst, the clause is vague and unprovable as an employer or employee could never show objective evidence of "full awareness." The better course is to delete the redundant clause (where the claimant is fully aware) and draft the rule consistently with the well-settled legal understandings of "willful" as intentional, voluntary, knowing or deliberate behavior.

Reasons Not Incorporated in Final Rule: The word "fully" was deleted from the definition of "willful." However, the remainder is based on the definition of "willful" contained in Merriam-Webster's Dictionary of Law © 1996.

Comment: WAC 192-150-205. "Wanton" behavior should be defined as "occurring when an individual has not intended to cause harm but acts in a reckless disregard of the rights of others." The legislature did not intend only criminal wanton misconduct to disqualify an applicant from benefits. The proposed definition of wanton confuses two standards of behavior and the difference between civil and criminal law to combine malicious conduct with reckless conduct. The Department should delete the words "intentional" and "malicious" from the definition of "wanton."

Reasons Not Incorporated in Final Rule: The term "wanton" does not suggest mere negligence, but a total disregard for the consequences of one's actions. The definition of "wanton" contained in the final rule is taken from Black's Law Dictionary (7th edition, 1999), Merriam-Webster's Dictionary of Law © 1996, and the Merriam-Webster Online Thesaurus.

Comment: WAC 192-150-205. Under the definition of "wanton," use of the words "malicious behavior" appears incompatible with the words "extreme indifference." Malicious behavior implies intent, whereas indifference implies no intent. The use of the word "extreme" should be removed.

Reasons Not Incorporated in Final Rule: See response above. Black's Law Dictionary defines "wanton" as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences."

Comment: WAC 192-150-205(6). "Flagrant and wanton" should mean no more than a reckless act that is conspicuously offensive. Flagrant should add only a sense of added gravity to the recklessness. Flagrant and wanton should be defined as "conspicuously offensive or blatant behavior showing extreme indifference to a risk of injury or harm to another that is known or should have been known."

Reasons Not Incorporated in Final Rule: The term "flagrant" has not been used in previous statutory language, nor has it been defined by the courts in relation to unemployment benefits. The definition of "flagrant" contained in the final rule is drawn from the Merriam-Webster Online Dictionary.

Comment: WAC 192-150-205(6). The following statement in defining flagrant should be removed: "so obviously inconsistent with what is right or proper that it can neither escape notice nor be condoned". This meaning is obscure in legal terms.

Reasons Not Incorporated in Final Rule: See above response. Merriam-Webster's Dictionary defines "flagrant" as "**2:** conspicuously offensive; so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality" and "applies usually to offenses or errors so bad that they can neither escape notice nor be condoned." In Oregon School Employees Association v. Pendleton School District, 85 Or. App 312, 736 P.2d 206, in a labor related context, the court held that misconduct must be "flaunting" or "notorious" to constitute "flagrant." The department will await further definition of this term by Washington courts.

Comment: WAC 192-150-205. Subsections (1)(a) and (2) of the statute refer to acts that demonstrate "disregard of the rights, title, **and** interests of the employer or a fellow employee." Subsection (4) refers to conduct that demonstrates "disregard of and for the rights, title, **or** interest of the employer or a fellow employee." [Emphasis added.] These three subparts are intended to have the same meaning.

Reasons Not Incorporated in Final Rule: Use of the terms "and" and "or" may be a drafting error. However, there is nothing in the legislative history to provide guidance. The department will base its decisions on the definitions contained in the rule and await further clarification by Washington courts.

Comment: WAC 192-150-205. The big distinction between subsection (4) and subsections (1)(a) and (2) of the statute is the use of the word "flagrant." The legislature also eliminated the word "willful" from subsection (4). In order to disqualify a person for gross misconduct under

subsection (4) it's necessary for the employer to bear the burden of proof. The employer has to bear the burden of showing that the violation was flagrant and wanton.

Reasons Not Incorporated in Final Rule: The statute is clear that gross misconduct includes actions that are both flagrant and wanton. A showing that the behavior was willful is not required. It is not necessary to repeat the statute in rule.

Comment: WAC 192-150-205(6). The difference between "willful" or "wanton" versus "flagrant and wanton" is "I did it on purpose. I didn't care that I was doing it. Or, I enjoyed it." If you are saying that gross misconduct is wanton, then wanton is already identified in misconduct. It has got to be flagrant and wanton to be gross misconduct.

Incorporated in Final Rule: Subsection (6) originally proposed a definition of "flagrant and wanton." However, "wanton" is already defined in subsection (2). In the final rule, subsection (6) was revised to define "flagrant" alone. By statute, a claimant's actions must be both flagrant and wanton to be gross misconduct.

Comment: WAC 192-150-205. The best example of a worker flagrantly disregarding the employer's interest is a situation where an employer is selling food products that are kosher and these products are advertised as kosher and the employee is doing something that violates that provision. It's not criminal, but it's a flagrant disregard of the employer's interest.

Reasons Not Incorporated in Final Rule: The final rule does not contain examples of actions that constitute gross misconduct. Whether a claimant's actions rise to this level will be determined on a case by case basis, after consideration of all evidence from the employer and the claimant. Outside of criminal activity, the statute requires that a claimant's actions be both flagrant and wanton to constitute gross misconduct.

Comment: WAC 192-150-205. The language in RCW 50.04.294(4) was based on language from the state of Montana. The department should use Montana's definition of the term "flagrant"

Reasons Not Incorporated in Final Rule: Staff contacted the state of Montana as suggested. Montana does not have a definition for the word "flagrant." Montana has no case law established on "flagrant" and they rarely use this provision to deny benefits.

Comment: WAC 192-150-210. Whether a tardy is inexcusable should be determined based on whether a person in the claimant's circumstances would have been late to work under the same circumstances. Whether an absence is inexcusable should be determined based on whether a person in the claimant's circumstances would have been absent from work under the same circumstances.

Incorporated in Final Rule: The rule provides that a tardiness or absence is inexcusable if a reasonably prudent person in the same circumstances would not be tardy or absent.

Comment: WAC 192-150-210. An employer must have warned an employee at least three or more times with at least one warning in writing if the employee had "repeated inexcusable tardiness."

Reasons Not Incorporated in Final Rule: The statute merely requires that a claimant must have received "warnings" for repeated, inexcusable tardiness. The language presumes at least two prior warnings. There is no requirement that the warning be issued in writing. The rule provides that the violation of these warnings must have been the immediate cause of discharge.

Comment: WAC 192-150-210. It needs to be more than the violation took place; but documented in some way. If an employee did get the warning, this warning should be proved such as this warning is in the employee's personnel record.

Reasons Not Incorporated in Final Rule: Nothing in statute requires that a warning be placed in the employee's personnel record. Although the burden is on the employer to establish that prior warnings were given, there may be other methods of accomplishing this.

Comment: WAC 192-150-210. To define "repeated inexcusable tardiness" the word "excessively" should be added to the definition. The definition would read: "Repeated inexcusable tardiness" means repeated instances of tardiness that are unjustified or that would not cause a reasonably prudent person in the same circumstances to be 'excessively' tardy."

Reasons Not Incorporated in Final Rule: The statute provides for disqualification of individuals who are repeatedly and inexcusably tardy. Adding the term "excessively" would imply that some amount of tardiness must be acceptable to employers. This is outside the scope of the statute.

Comment: WAC 192-150-210. It needs to be something more than just that the violation took place, but that it was documented. If the claimant did get a warning, it should be a warning that could be proved.

Reasons Not Incorporated in Final Rule: Although not specifically referenced in the rule, the burden to establish misconduct is on the employer. Although "proof" is not required, the department will make its decision based on the preponderance of evidence.

Comment: WAC 192-150-210(2). "Dishonesty related to employment" should include the language "for the purpose of material gain." The new definition would read: "Dishonesty related to employment" means the intent to deceive the employer on a material fact "for the purpose of material gain."

Reasons Not Incorporated in Final Rule: The proposal is outside the scope of the statute as it would place limitations on the types of dishonesty related to employment that could potentially disqualify an individual from receiving benefits.

Comment: WAC 192-150-210(2). Along the line of job applications, if a question cannot be legally asked, then it should not be included in the determination.

Reasons Not Incorporated in Final Rule: Decisions will be made on a case by case basis, after weighing all evidence from the claimant and the employer. The action resulting in discharge must be connected with the claimant's work and the employer carries the burden of establishing misconduct by a preponderance of the evidence.

Comment: WAC 192-150-210. For "repeated and inexcusable absences," previous warnings from the employer should be required and the claimant's repeated absences must have been the immediate cause of the discharge.

Reasons Not Incorporated in Final Rule: The statute only refers to warnings in the context of tardiness, not absences. Requiring warnings concerning absences is outside the scope of the statute. For example, an employee fails to show up for work without notice for three consecutive days. Investigation shows the employee was vacationing during that period. Even though the employee may not have been warned previously, the employee's actions could constitute misconduct as "repeated and inexcusable" absences. The final rule does provide that the absences must have been the immediate cause of discharge.

Comment: WAC 192-150-210. The record that a claimant knew or should have known of the rule is the fact that they signed their employee handbook.

Incorporated in Final Rule: The rule provides that receiving a written copy of the employer's rules is sufficient to establish that the claimant should have known about the rule (assuming the written version is in a format understandable to the claimant).

Comment: WAC 192-150-210. For a rule violation to be the basis of a disqualification for misconduct, the employee should have received training and orientation on the rule and the rule's importance.

Reasons Not Incorporated in Final Rule: The statute does not require employers to provide training and orientation on the rule. It only states that misconduct can be established for violation of a reasonable rule when the rule is known or should have been known. The final rule provides that an employee "should have known" of the rule if he or she was provided a copy of the rule in writing, or the employee is provided an orientation on the rule, or the rule is posted in an area that is frequented by the employee. In addition, the rule must be conveyed or posted in a language that is understood by the claimant before the department will find that the claimant should have known about it.

Comment: A company rule should be considered reasonable only if it is "not inconsistent with the law."

Incorporated in Final Rule: The rule provides that a company rule is reasonable if it relates to the individual's job duties, is a normal requirement or practice for the occupation or industry, or is required by law or regulation.

Comment: WAC 192-150-210. If an employer were to say, "Three years ago you violated the company rule," it should have been a rule that was broken that was documented. An employer cannot say that a person broke a rule that they should have known about, but it was never documented.

Reasons Not Incorporated in Final Rule: It is well established through case law that the burden of demonstrating misconduct is on the employer as the moving party. In addition, the alleged act of misconduct must have been the cause of the discharge to disqualify an individual from receiving unemployment benefits. This would not happen if the employer permitted the individual to continue working for three years after the alleged violation took place. [A rule on this subject may be considered at a later date.]

Comment: WAC 192-150-210. There may be some confusion as to when the triggering event occurs. The legislation did not intend on discharging an individual for misconduct that occurred three years ago. The intent was clear that maybe three years ago the claimant was told about rules, they signed a statement that they knew what the rules were, and subsequently violated them. It's the triggering event that is intentionally covered here. The intent is that an employee who has been informed of the rules, and then at a subsequent time violates these rules, the threshold is reached.

Reasons Not Incorporated in Final Rule: See previous response.

Comment: Revise WAC 192-150-210 as follows:

(4) A company rule ~~is~~ **may be** reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation. . . .

(6) You ~~are~~ **may be** considered to be acting within your "scope of employment" if you are: . . .

Reasons Not Incorporated in Final Rule: As written, the rule provides greater clarity regarding the factors that will be used by the department to establish misconduct. Benefits would not be denied unless the employer is able to establish misconduct by a preponderance of the evidence.

Comment: A deliberate violation or disregard of standards of behavior which the employer has the right to expect of an employee requires a "reasonableness" showing and it would also require a showing that the employee engaged in "deliberate" violations.

Reasons Not Incorporated in Final Rule: The department has not attempted to identify in rule those standards of behavior that may be considered reasonable. This will be determined based on the facts specific to each situation. We anticipate further clarification will be provided by Washington courts.

Comment: WAC 192-150-210. Employers should not be required to post their rules in any language other than English. Employees are responsible to understand an employer's rule or instructions in English.

Reasons Not Incorporated in Final Rule: The rule does not require the employer to post rules in any language. It simply provides that, before determining that the claimant committed misconduct by violating a rule he or she should have known about, it must have been conveyed to them in a manner that was understandable to them. Nothing in the statute incorporates the ability to understand English as a prerequisite to establishing eligibility for unemployment benefits.

Comment: WAC 192-150-210. There is a problem with subsections (2)(e) and (2)(g) of the statute. Subsection (2)(g) limits misconduct to violation of law acting within the "scope of employment." Subsection (2)(e) does not have any such limitation. If intent matters, then it sounds like going with the narrower provision is appropriate here.

Reasons Not Incorporated in Final Rule: WAC 192-150-200 provides that the action that resulted in discharge must be connected with the claimant's work to constitute misconduct. However, the distinction is that (2)(g) further narrows its application to actions committed within the scope of the claimant's employment. Conceivably, an illegal act could take place outside the claimant's scope of employment, yet still be connected to their work and disqualify them under (2)(e).

Comments: WAC 192-150-220. The legislature eliminated the words "competent authority" and substituted the requirement that the admission needs to be made in a criminal court. "For which the individual has been convicted in a criminal court, or has admitted committing…" also in a criminal court. This is a reference to an Alford plea, where the defendant appears in front of the court and says to the court, "in lieu of conviction, your honor, I'm going to make an Alford plea. I plead that there are necessary facts contained in the records that are before the court to convict me of the offense, and I'm ready to subject myself to the jurisdiction of the court and take whatever sentence the court may hand down to me." This is not the same as a conviction. Subpart (4) requires an admission in court.

Reasons Not Incorporated in Final Rule: The statute says "for which the individual has been convicted in a criminal court, or has admitted committing . . ." A plain reading of the statute indicates these are two separate provisions. Nothing requires the admission to have been made in criminal court.

Comment: WAC 192-150-220. A finding of gross misconduct would be a conviction in criminal court but it would also be "admitted committing." The admission could be outside of an "Alford" plea.

Incorporated in Final Rule: See above. The final rule addresses both convictions in criminal court and admissions to a competent authority.

Comment: WAC 192-150-220. For gross misconduct, even though the statute definition didn't say "admitted committing to a competent authority," when the Department is looking whether to disqualify or qualify an individual, the claimant had to have admitted committing to a competent authority (exclusive of the employer).

Incorporated in Final Rule: Section 6 uses the phrase "admitted committing" while Section 9 uses the phrase "admitted committing to a competent authority." Both refer to criminal acts committed by the claimant. For the sake of consistency, the final rule requires that, to find gross misconduct, the admission must have been made to a competent authority.

Comment: WAC 192-150-220. The statute does not limit or restrict "admission of a criminal act" to specific individuals or agencies; thus the statute should not be limited by rules.

Reasons Not Incorporated in Final Rule: See above. In addition, when asked whether the department should accept admissions made to co-workers, former spouses, neighbors, etc., stakeholders were opposed and indicated there should be limitations placed on the source of the admission. The final rule uses the phrase "admission to a competent authority" and defines those entities that are considered competent authorities.

Comments: Referring to WAC 192-150-220

- We should have a law similar to Oregon, which will accept a signed statement by a claimant. If during fact finding you get an admission and an adjudicator gets them (the claimant) to sign or to write it out that they did it (the misconduct), that should be clear evidence to the adjudication process that they did it. Now, where they admit to an adjudicator and the adjudicator writes that down and the individual won't sign it, then you get into some gray areas. Deny the claimant benefits on that admission alone and put in the record or the file that they admitted to their misconduct and who they admitted it to. Admissions to Department staff should be included. If they admit misconduct to their spouse or somebody else, then it gets to credibility and its hearsay.
- The Department should add department employees to the list of persons to whom a claimant can admit committing a criminal act.

Reasons Not Incorporated in Final Rule: If a claimant admits to an adjudicator that he or she committed an act resulting in their discharge from work, that statement can be used to establish misconduct. However, this subsection refers to an admission of a criminal act which is used to establish gross misconduct. Department staff are not trained to determine which individual actions constitute crimes under the law. In addition, interviews by staff with claimants are done by telephone and there is not an opportunity to obtain a signed statement from the claimant. The department is unwilling to have its staff called as witnesses in criminal proceedings to determine the guilt or innocence of the claimant. The final rule limits "competent authority" to entities with law enforcement or regulatory oversight concerning the behavior that resulted in the discharge, that have the expertise to determine whether a criminal act in fact occurred.

Comments: Referring to WAC 192-150-220

- Admission to the employer would be acceptable, generally, if it were a larger company.
- Keep your current rule definition for admissions. The only other addition that might be made is if the claimant admitted something to the employer and there is evidence of this admission (e.g., in writing). If you have hard evidence of an admission, it should be at least considered.

- If the employer says the claimant admitted to misconduct and the claimant says that they didn't admit to misconduct, then that's different. But if the person is admitting misconduct, then his or her admission should be acceptable.
- In regards to admission of a criminal act, admission to the employer would be acceptable.

Reasons Not Incorporated in Final Rule: The employer is an interested party to the decision as to whether the claimant has committed gross misconduct. As such, the employer has a financial stake in the outcome of the department's fact finding and cannot be considered impartial. While information from both the claimant and the employer will be considered, an admission of a criminal act must be made to a competent authority.

Comment: WAC 192-150-220. Because the penalty for gross misconduct is so severe, the Department should continue to interpret the admitted committing of a crime which you have as the same admission to a judicial body and not expand it any more.

Incorporated in Final Rule: The final rule provides that a competent authority includes judicial, law enforcement, and regulatory authorities.

Comment: WAC 192-150-220. The licensing authorities ought to have the same standing as a court or administrative law judge and that's currently not the case.

Incorporated in Final Rule: The term "competent authority" includes both regulatory agencies and "any other person or body …with authority to administer disciplinary action" against the claimant. This would include the licensing authorities.

Comment: WAC 192-150-220. Subsection (2)(d)(i) provides that an admission by a claimant to a "prosecuting attorney, or law enforcement agency" establishes gross misconduct. This approach ignores the problem of "false confessions" in which an individual admits to conduct they did not in fact do. Standing alone, an admission to a prosecuting attorney, or law enforcement agency should not be sufficient to establish gross misconduct.

Reasons Not Incorporated in Final Rule: Again, the standards of proof in criminal proceedings and unemployment eligibility decisions are not the same. The department uses the "preponderance of evidence" standard. If a claimant makes an admission of a criminal act to a law enforcement agency or prosecuting attorney, that is sufficient to establish a finding of gross misconduct.

Comment: WAC 192-150-220. There are different elements for each criminal charge. A claimant should have to admit to all of them in order to be disqualified or have wage credits removed.

Incorporated in Final Rule: The rule provides that, to qualify as an admission to a competent authority, the claimant must admit to each and every element of the criminal act.

Comment: WAC 192-150-220. If an employer wants to bring a gross misconduct claim under the second clause (flagrant and wanton actions), the employer needs to identify gross misconduct at the time of the claimant's application for benefits. An adjudicator decision needs to be made and finalized at the outset of the application process. If the employer doesn't make an allegation to the Department at the time of a claimant's application for benefits, they don't get a "second bite at the apple" under statutory formulation.

Reasons Not Incorporated in Final Rule: If an employer fails to respond to the department's request for information concerning the job separation, a decision may be made based on the information available. RCW 50.20.160(3) provides that a determination of allowance of benefits is final after 30 days. A redetermination can be made at any time within two years to recover benefits improperly paid. An exception is made for determinations made after consideration of the provisions of RCW 50.20.010(1)(c), RCW 50.20.050, 50.20.060, 50.20.080, or 50.20.090. The statute was not amended to extend this exception to the new misconduct statute, RCW 50.20.066. Therefore, a redetermination can be made on a misconduct or gross misconduct decision issued under RCW 50.20.066 at any time within two years to recover benefits improperly paid.

Comment: In terms of when an employer can assert a claim, there are already rules on redetermination, and those are not being changed. In some cases, an employer gives information after the fact because they never knew about the initial claim. The statute under Section 9(3) does say that the employer will notify the department of the conviction, but (4) burdens the claimant with reporting that exact same information. And so the claimant has to be held accountable if s/he has not reported it.

Reasons Not Incorporated in Final Rule: See previous response. The failure to list RCW 50.20.066 may be a drafting error, but this cannot be determined from the legislative history.

Section 9. RCW 50.20.066 Penalties for Misconduct and Gross Misconduct

Comment: WAC 192-150-220. Because the penalty for gross misconduct is so severe, the Department should continue to interpret the "admitted committing of a crime" as the same as an admission to a judicial body, and not expand upon it further.

Incorporated in Final Rule: Except for the deletion of "assistant attorney general," the definition of "competent authority" remains unchanged.

Comment: WAC 192-150-220. Under the definition of competent authority, subsection (2)(d)(iv) should be eliminated and leave subsections (i) through (iii). Subsection (iv) is vague and would seem to allow various quasi-legal entities some standing.

Reasons Not Incorporated in Final Rule: This clause has been part of the definition of "competent authority" since 1982. Although rarely used, it provides flexibility for the department to consider admissions made to other entities with authority to administer disciplinary action against the claimant.

Comment: WAC 192-150-220(3). If you are removing a claimant's hours due to gross misconduct, from an accounting standpoint you should be removing these hours on the same percentage basis that the employer would be charged on the liability of the claim. You need to prorate back.

Incorporated in Final Rule: The final rule provides that the balance of wage credits to be canceled will be taken proportionately from the claimant's base year employers according to each employer's share of base period wages.

Comment: WAC 192-150-220(3). Take the most hours that you can from the separating employer, upon whom the gross misconduct was alleged, then for the rest of the base year employers determine the percentage on what they would have been charged proportionately.

Incorporated in Final Rule: The final rule provides that all wage credits from the affected employer will be canceled. If this is less than 680 hours, the remainder will be removed proportionately from the claimant's other base year employers.

Comment: WAC 192-150-220(3). Section 21 of the bill (RCW 50.29.021) specifically limits the circumstances under which the Department can credit employers' accounts. Canceling a claimant's wages due to gross misconduct and then removing these wages proportionately from an employer account is not one of those circumstances.

Reasons Not Incorporated in Final Rule: The statute provides that benefits are charged to employers based on the ratio of wage credits paid by each employer during the base year. Once the wage credits are canceled they are no longer part of the claimant's base year. By definition, the employer will not be charged for those wages.

Comment: WAC 192-220-030. The requirement that waiving an overpayment is based on equity and good conscience is a long-standing part of federal jurisprudence as it applies to these programs. Not allowing a waiver or offer in compromise creates a real federal conformity problem. The Department cannot create a set of circumstances where a decision is reversed, and there is no opportunity for a waiver of benefits that have been overpaid. This violates both the holdings in the U.S. Supreme Court in the *"Java"* case; and, would also violate the requirements of waiver of overpayments that exists under the SSA 26 USC 3304.

Reasons Not Incorporated in Final Rule: The provision that overpayments resulting from a discharge for misconduct are recoverable notwithstanding the principles of equity and good conscience is contained in RCW 50.20.066(5). The U.S. Department of Labor has reviewed the legislation and has not advised the department of a potential conformity issue related to this subsection.

Comment: Subsection (1)(c) of WAC 192-220-030 denies consideration of waiver requests that are the result of a discharge for misconduct or gross misconduct. This is contrary to the language of the statute, RCW 50.20.066 which provides that benefits paid in error "are recoverable." The

statute does not state that the benefits "shall" be recoverable or any other term that suggests mandatory application.

Reasons Not Incorporated in Final Rule: Benefits paid in error are recoverable unless waived due to equity and good conscience (RCW 50.20.190) or when the department accepts an offer in compromise (RCW 50.24.020). The statute provides that benefits paid to a claimant discharged for misconduct or gross misconduct are recoverable "notwithstanding RCW 50.20.190 and RCW 50.24.020."

Comment: WAC 192-220-010. Subsection (1)(g) gives a claimant ten days to respond to an overpayment notice. This requirement should be amended to provide for ten business days, or thirty days total. Claimants have a right to a reasonable period of time in which to respond.

Reasons Not Incorporated in Final Rules: This language resulted from a settlement agreement reached approximately 20 years ago between the department and Evergreen Legal Services. Amendment of this provision is outside the scope of this rule-making action.

Comment: WAC 192-220-020(2). Two more examples should be added to the list of conditions under which the claimant is at fault for the overpayment: "(f) The Department erroneously removed a payment stop, resulting in improper payment; and (g) You received a retroactive pension which was backdated by a pension source, even though not at your request."

Reasons Not Incorporated in Final Rules: These proposed changes are outside the scope of this rule making action.

Section 10. RCW 50.20.240 Job Search Monitoring Program

Comment: WAC 192-180-030. For every week a claimant states they had searched for work, and their log doesn't match this fact, the claimant would be denied benefits and would have to repay those benefits.

Incorporated in Final Rule: The rule provides that benefits may be denied for any weeks in which a claimant's job search log fails to establish that the claimant has met the minimum job search requirements.

Comment: We're not talking about someone who doesn't report correctly or someone who doesn't fill in their paperwork correctly; we're talking about someone who doesn't do their job search.

Incorporated in Final Rule: Benefits may be denied to a claimant whose documentation of their job search is unsatisfactory. If the job search requirements are met but the claimant simply requires assistance in completing the log correctly, technical assistance will be provided.

Comment: There is essentially a difference between claimants who falsify their work search logs and those who don't do the work search. This law is for people who don't do their work search as required.

Reasons Not Incorporated in Final Rule: Benefits may be denied to an individual who provides false or misleading information on the job search log.

Comments: Referring to WAC 192-180-025(3).

- When deciding how many weeks of a claimant's logs to review, it all depends on your work search policy. You could request a claimant's logs and review their last four weeks. If you find the claimant didn't comply two out of those four weeks, then you could look at all of the weeks because now you've been shown that the claimant either has not or did not comply; and, therefore we are going to look at more during this claim period.
- We [business] would support the idea that if there were an indication of inadequate job search, ask for more; but the department should not have to go through all weeks in all cases.
- Previously there was a suggestion that you didn't have to automatically look at all of the weeks on all of the people that you randomly check. This was a suggestion from the business community; and, from our perspective [labor] that would be reasonable. You should only review all weeks if there is some indication that you need to look at all of those weeks.

Incorporated in Final Rule: The final rule provides that the department will review one week of job search documentation. If the job search is unsatisfactory or the claimant does not appear for the review, all weeks will be reviewed.

Comment: WAC 192-180-025. Subsection (3)(c) needs to include a new subpart (v) that reads "or an emergency circumstance or circumstance beyond a reasonably prudent person's control."

Reasons Not Incorporated in Final Rule: The department's past experience has shown that there is a significant "no show" rate for claimants scheduled for job search reviews. By limiting the reasons under which an individual may be excused, it is the department's goal to increase the effectiveness of the job search monitoring program. The individual is not denied benefits for failing to attend the initial job search review appointment. Rather, they are scheduled for another appointment to review all weeks of their job search activity.

Comment: WAC 192-140-090. If an individual does not report for reemployment services pursuant to the profiling system, and the justifiable cause for failure to participate is due to a claimant's illness or disability or that of a member of the claimant's immediate family, language should be added to say that the claimant's illness or disability or that of a member of the claimant's immediate family "prevented them from participating."

Incorporated in Final Rule: The rule already provides that justifiable cause includes factors that would cause a reasonably prudent person in similar circumstances "to fail to participate."

Comment: WAC 192-140-090. Even though the claimant's illness or disability or that of a member of the immediate family can be identified as justifiable cause for not participating in

reemployment activities, the rule should add that this cause "prevents the claimant from participating." The rule should specify that this justifiable cause requires a claimant's personal presence and therefore they cannot participate in reemployment activities.

Reasons Not Incorporated in Final Rule: The rule already provides that the department will consider whether a reasonably prudent person in similar circumstances would fail to report for reemployment services. The proposed language is unnecessary.

Comment: WAC 192-180-030. If a claimant does not attend a job search review that has been scheduled to review all weeks claimed, the language should read that the claimant's benefits "will" be denied for any weeks at issue instead of "may" be denied.

Reasons Not Incorporated in Final Rule: The claimant has the right to be advised of his or her rights and to provide the department with reasons why benefits should not be denied for the weeks at issue. The decision to allow or deny benefits will be made after information from the claimant is reviewed.

Comment: WAC 192-180-030. Leave the language that the claimant's benefits "may" be denied.

Incorporated in Final Rule: See previous response.

Comment: WAC 192-180-040. Subsection (5)(b) referring to RCW 50.20.080 should be removed.

Incorporated in Final Rule: The requested change has been made.

Comment: WAC 192-180-025(3). Under subsection (3)(a), the interviewer should review "at least" one week of the claimant's job search documentation and under subpart (3)(b) the rescheduled review should be for a review of "at least" one week of the claimant's job search documentation.

Reasons Not Incorporated in Final Rule: The final rule provides that the interviewer will review at least one week during the initial interview. If the claimant is excused from this interview, the claimant will be rescheduled for a review of one week. However, if the claimant's absence from the first interview is unexcused, the review will be for all weeks.

Comment: WAC 192-180-025(3). The interviewer should review the "last week" of the claimant's job search documentation.

Reasons Not Incorporated in Final Rule: The notice mailed to the claimant gives the week that is scheduled for review. Normally this is the last week claimed. However, because the department must provide the claimant with adequate notice of the time and date of the interview, the week requested for review in the letter is no longer the last week claimed.

Comment: Requiring a claimant to keep their job search log for at least 60 days seems excessive and would prefer 30 days.

Incorporated in Final Rule: The requested change has been made.

Section 11. RCW 50.20.120 Amount of benefits

Comments: Referring to WAC 192-110-200.

- This is only a one-time trigger. Volatility of the unemployment rate doesn't really matter. It was not the intention of the legislature that anytime the unemployment rate goes back above 6.8 percent we will go back to paying 30 weeks of benefits.
- The intent was to put the state of Washington in line, from a competitive standpoint, with other states. There's only one state now, Massachusetts, which pays 30 weeks.
- Look at the intent of the legislature, not what is written.
- It does appear that there are two questions here. One, which rate to use; and two, was it intended to be a trigger that said as soon as the state hits that level we're going to bump back up to 30 weeks. The clear intent was not to have (the maximum) benefits (payable) jump and down, so that today someone get 26 weeks and tomorrow someone gets 30 weeks. As to which rate to use, you could make a strong case for the three-month seasonally adjusted average. Since you use that measure for other things (such as, extended benefits), you could make a strong argument that it's an appropriate measure to be used here.
- This and a couple of other measures were clearly intended to suppress the cost to the system for a period of time until the economy's health improved.
- Its not "any month." It is the singular month in which the commissioner finds the rate is less than 6.8 percent benefits shall be payable. What was written and what was passed said "the month" in which it goes below. That's a singular event and it should remain that way.
- The intent was that we would remain at 30 weeks only until our unemployment was at a more stable rate and dropped, so as not to affect benefits while unemployment is at such a high rate. However, once that threshold is reached, the reduction is permanent.
- The intent was very clear to have it drop to 26 weeks permanently after the trigger point.
- The intent was to be consistent with the rest of the nation and 26 weeks.
- The law says that in "the month" that our current unemployment rate goes to 6.8 percent any claim thereafter is changed to 26 weeks. There is no language that says it can go back up to 30 weeks. There's nothing at all that says that.
- The insertion of an unemployment rate trigger was merely an attempt by the legislature to replace an absolute effective date with a date triggered by the moment in time that the state's unemployment rate dropped to 6.8 percent or below. It was clear that the legislature wanted to make long-term systemic reforms to the state's maximum duration of benefits.
- Business supports the proposal to use the three month seasonally adjusted unemployment rate as the trigger.

Incorporated in Final Rule: The statute as worded can be read two ways: that the 6.8% unemployment rate is a one-time trigger, or that it is an ongoing mechanism to determine whether benefits may be paid for 26 or 30 weeks. Discussions between the department and the

bill sponsor indicated that the intent was for a one-time trigger. Once the 6.8% level was reached, the reduction would be permanent.

Comments: Referring to WAC 192-110-200.

- The law doesn't mention anything about what other states do, or that Washington should be in line with other states. We go by what the words say.
- Section 11(1)(a) of the statute clearly states that maximum weekly benefits are to be 30 weeks. Section (1)(b) states an exception when the "unemployment rate is six and eight-tenths percent or less" in which case the maximum weekly benefits are to be twenty-six weeks. As a consequence, WAC 192-110-200 should delete the word "permanently" and add language that states that the maximum weekly benefits will only be reduced to 26 weeks when the three-month seasonally adjusted unemployment rate falls to 6.8 percent or below and will remain at 30 weeks when ever this unemployment rate rises above 6.8 percent.
- There were no public hearings on this bill. This bill was drafted on the last day of the special session. The first available copy any of us [labor] had a chance to read was about six hours after the session ended. In terms of legislative intent, there's no one in this room that knows what the legislative intent was on this section. But, what is clear is the language of the law.
- It's very clear what is meant. When the unemployment rate falls to 6.8 percent or lower, then the weeks will drop from 30 to 26. But, once the rate goes above that, we are back to 30 weeks. That is what the language says. Regardless of what someone thinks the intent of this section was, that's what the language says. That's the law.
- To permanently reduce the benefits to a maximum duration of 26 weeks will have a devastating impact on working families in this state.
- Labor would like to go on record as expressing its disagreement both with the final proposed language of this rule, and the fact that they were not consulted before the department changed its original interpretation.

Reasons Not Incorporated in Final Rule: See previous response. Because the statute is subject to two interpretations, the department anticipates that the issue will ultimately be resolved by the courts. However, until that time the department will comply with the stated legislative intent.

Other comments related to housekeeping rule changes.

Comment: Revise WAC 192-04-040(1) into two clauses for purposes of clarity.

Incorporated in Final Rule: The suggested change has been made.

Comment: Revise WAC 192-120-050(1) to delete the phrase "until and unless you have been provided adequate notice and an opportunity to be heard."

Reasons Not Incorporated in Final Rule: As written, the rule permits the department to deny benefits if the claimant fails to respond to a request for additional information. As proposed, the rule could be interpreted to require the department to continue making payments.

Comment: Revise WAC 192-130-080 subsection (2) by changing the word "may" to "will."

Reasons Not Incorporated in Final Rule: The proposal would mean that, instead of *permitting* the department to issue a decision once 10 days have elapsed, the department would be *required* to issue a decision then. There are times when workload prevents the department from issuing timely decisions. Although the department strives to meet timeliness standards, we will not adopt a rule which specifies timelines within which decisions must be issued.

Comment: Revise WAC 192-130-080 subsection (5) by changing the word "may" to "will."

Incorporated in Final Rule: The requested change has been made.

Comment: Revise WAC 192-140-070 as follows:

(1) If you report that you were not able to work or not available for work in any week or do not report whether you were able to work or were available for work, **or** do not provide details regarding your ability to or availability for work as requested, the Department **may** presume you are not able or not available for work and benefits will be denied under RCW 50.20.010(1)(c).

(2) If you provide information that indicates you are not able to work or not available for work because of a circumstance that is expected to continue beyond the immediate week or weeks claimed, **or** you do not provide information regarding your ability to or availability for work, benefits **may** be denied under RCW 50.20.010(1(c).

Reasons Not Incorporated in Final Rule: The proposal would change existing procedures for processing weekly claims. When a claimant files a weekly claim for benefits, they may provide information indicating they are not able to work or available for work. The department provides an advice of rights and requests additional information from the claimant. If the claimant fails to respond to the notice, the department will issue a presumptive denial of benefits. This denial may be redetermined if information is received from the claimant at a later date.

Comment: Revise WAC 192-140-075 subsection to state:

> If you report that you were not actively seeking work in any week or do not report whether you made an active work search for work **or** subsequently fail to report complete job search details……

Reasons Not Incorporated in Final Rule: This section deals with the processing of weekly claims. Only after the claimant provides potentially disqualifying information and fails to respond to the requesting additional information are benefits denied.

Comment: Revise WAC 192-140-080 subsection (1) to state:

> If you have been issued a job search directive as provided in WAC 192-180-010, do not report a job search that meets the requirements outlined in the directive, **or** you do not provide additional job search information as requested or you respond with information that does not meet these requirements, the Department **may** presume . . .

Reasons Not Incorporated in Final Rule: See previous response.

Comment: Revise WAC 192-140-085 subsection (1) by changing the word "will" to "may."

Reasons Not Incorporated in Final Rule: See responses to the previous three comments.

Comment: Revise WAC 192-140-090 subsection (3) by changing the word "will" to "may."

Reasons Not Incorporated in Final Rule: Participation in reemployment services when directed is a condition of eligibility under RCW 50.20.010(1)(e) unless justifiable cause is demonstrated.

Comment: Revise WAC 192-140-090 subsection (4) by changing the word "which" to "that."

Incorporated in Final Rule: The requested change has been made.

Comment: Revise WAC 192-140-100 to state:

(1) If you do not respond to a request for information regarding a discharge from work or have not provided sufficient information to identify or contact the employer, within ten days to the notice, the Department may make a decision at that time based on available information.

(2) If the Department receives information from the employee after the end of the ten day response period, but before the decision has been made, the information provided by the employee may be considered before making the decision if the information was mailed to the unemployment claims TeleCenter identified on the notice. For claims with an effective date prior to January 4, 2004, benefits will be denied under RCW 50.20.060. For claims with an effective date of January 4, 2004, and later, benefits will be denied under RCW 50.20.066. If you have provided the Department with sufficient information to contact the employer, benefits will not be denied unless the employer establishes by a preponderance of evidence that you were discharged for misconduct connected with your work.

(3) If the Department receives information from the employee after the end of the ten day period and within thirty days following the mailing of the notice, the Department may consider that information for the purposes of a redetermination under RCW 50.20.160 or as an appeal of the decision.

(4) This denial is for an indefinite period of time and will continue until you meet the requalification provisions of RCW 50.20.060 or RCW 50.20.066, as applicable.

Reasons Not Incorporated in Final Rule: The existing rule outlines the department's procedures for handling weekly benefit claims where potentially disqualifying information is received from the claimant. If the claimant does not respond to a request for additional information, a presumptive denial is automatically generated. A redetermination may be issued if information is later received from the claimant.

Comment: Revise WAC 192-140-120 to state:

(1) If you or another party notifies the department that you are in school and you do not respond to a request for information regarding school attendance, within ten days to the request the Department may make a decision at that time based on available information. Benefits **may** be denied under RCW 50.20.095 and RCW 50.20.010(1)(c).

(2) If the Department receives information from the employee after the end of the ten day response period, but before the decision has been made, the information provided by the employee may be considered before making the decision if the information was mailed to the unemployment claims TeleCenter identified in the notice.

(3) If the Department receives information from the employee after the end of the ten day period and within thirty days following the mailing of a notice, the Department may consider that information for the purposes of redetermination under RCW 50.20.160 or as an appeal of the decision.

(4) This denial of benefits is indefinite in nature and will continue until you establish that you are eligible under RCW 50.20.095 and RCW 50.20.010(1)(c).

Reasons Not Incorporated in Final Rule: See previous response.

Comment: Amend WAC 192-200-010 by deleting subsection (2).

Reasons Not Incorporated in Final Rule: The comment would eliminate the prohibition against training leading to baccalaureate or higher degrees. This is outside the scope of this rule-making action.